Filed 4/6/10 P. v. Ochoa CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ENRIQUE OCHOA, Defendant and Appellant.	G041693 (Super. Ct. No. 08CF2180) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed in part and reversed in part.

David K. Ries, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Arlene Sevidal and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

The prosecutor did not commit misconduct. Defendant was not denied his equal protection guarantees because his sentence for possession of rock cocaine is greater than it would have been had he been convicted of possession for sale of powdered cocaine. The trial court did err when it imposed a $30 court facilities fine because the statute requires a conviction under the Vehicle Code, which defendant did not suffer. We affirm in part and reverse in part.

I

FACTS

A jury convicted defendant Enrique Ochoa of possession for sale of cocaine base in violation of section 11351.5 of the Health and Safety Code. The court sentenced him to three years in prison.

Santa Ana Police Department Patrol Officer Daniel Padron testified he spent two years working the Evergreen area of Santa Ana. It is a residential street on which the officer has investigated assaults and narcotics transactions. He described the street as a "high narcotic area."

On July 23, 2008, Padron "saw a mid 1990's white Honda Accord parked in the middle of the street." In addition, Padron observed "two males on the west sidewalk directly west of the white Honda Accord." In court, Padron identified defendant as one of those males standing on the sidewalk. He said the other man with defendant is named Sosa.

Padron observed the "gentleman" in the car wave to the two on the sidewalk. Defendant and Sosa walked toward the vehicle. The three "engaged in a brief conversation." Padron was asked what happened next. He said defendant "walked back to the sidewalk where I had originally observed him and squatted down and appeared to be removing an unknown object from within a white unknown object." Defendant then returned to the vehicle and appeared to open his fist and show the occupant of the vehicle

an item in his right hand. At that point, according to Padron, "[t]he driver of the vehicle appeared to hand Mr. Sosa an item which he then placed in his right rear pocket." Then defendant reached his arm into the vehicle and the driver made a hand gesture toward defendant's hand.

Based on his training and experience, Padron said he had observed a narcotics sale. Padron then made contact with defendant and Sosa. In Sosa's right rear pocket, Padron found "[a] lone $20 bill." He determined the white object he had seen earlier was a "plastic Yoshinoya drinking cup." Inside the cup was a clear plastic baggie containing rock cocaine with a street value of approximately $300. Padron searched the area and found no drug paraphernalia. It was determined that neither defendant nor Sosa were under the influence.

Padron was asked whether or not, based on everything he saw as well as his training and experience, he had an opinion the cocaine base he found was possessed for the purpose of sales. He responded: "Based — again, based on the actions of the driver of the vehicle, the two individuals that I contacted, the location of the narcotics and the packaging, I formulated the opinion that they were being used for sales of narcotics."

II

DISCUSSION

Alleged Prosecutorial Misconduct

Defendant contends the prosecutor committed misconduct during rebuttal argument, and that the court erred when it overruled defense counsel's objection. The Attorney General says there was no misconduct.

During rebuttal argument, the prosecutor stated: "I think it's striking that even after I got up and argued, the defense still can't give you an alternate theory of the case. That says a lot. [¶] They are not required to put on any witnesses, they are not required to produce any sort of evidence. But you would think if the defendant was

innocent and didn't do this and didn't possess those drugs." At that point, there was an objection which the court overruled. The prosecutor continued: "You would think there would be a second reasonable explanation. And there's not. There's not. There never has been. [¶] And based on everything you heard in this case, there is only one reasonable conclusion. That those drugs were possessed for sales."

"'It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. . . .' [Citation.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. (*Donnelley v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *People v. Hill* (1998) 17 Cal.4th 800, 819.) Misconduct by a prosecutor that does not render a criminal trial fundamentally unfair is error under state law "if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

"Generally, a claim of prosecutorial misconduct is preserved for appeal only if the defendant objects in the trial court and requests an admonition, or if an admonition would not have cured the prejudice caused by the prosecutor's misconduct. [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 726.) "[T]he initial question to be decided in all cases in which a defendant complains of prosecutorial misconduct for the first time on appeal is whether a timely objection and admonition would have cured the harm. If it would, the contention must be rejected [citation]; if it would not, the court must then and only then reach the issue whether on the whole record the harm resulted in a miscarriage of justice within the meaning of the Constitution." (*People v. Green* (1980) 27 Cal.3d 1, 34.)

Here defendant did object, but he does not cite us to any record reference showing he requested an admonition. Nor does he argue in his brief that an admonition would not have cured any prejudice. While we do not find there was misconduct, we are satisfied that an admonition by the court would have cured any perceived harm. Accordingly, his claim of prosecutorial misconduct is not cognizable on appeal. (*People v. Smith* (2003) 30 Cal.4th 581, 633.)

Had defendant's claim of prosecutorial misconduct been preserved for appeal, we conclude it lacks merit. Boiled down to its essence, the prosecutor merely argued there was no other reasonable explanation than defendant possessed the drugs for sale. We find no unfairness, deception or reprehensibility in the comments. Besides the trial court instructed the jury that statements of counsel are not evidence.

Were we to find the prosecutor's statements amounted to misconduct, we would conclude there has been no miscarriage of justice. The evidence against defendant is strong. A police officer, trained and experienced in working in a high narcotics section of the city, personally observed defendant's actions, and found approximately $300 worth of rock cocaine in his possession. The officer determined defendant was not under the influence, and that there was no drug paraphernalia in the vicinity. Under the circumstances of this record, we conclude beyond a reasonable doubt that if there was prosecutorial misconduct, it did not contribute to the verdict, and that there is no reasonable probability there would have been a result more favorable to defendant but for the prosecutor's misconduct. (*Chapman v. California* (1967) 386 U.S. 18; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Government Code Section 70373

Defendant contends the trial court erred by imposing a $30 fee pursuant to Government Code section 70373, subdivision (a)(1) because the statute requires a

conviction for violation of the Vehicle Code, and defendant was convicted of violating only the Health and Safety Code. The Attorney General says defendant forfeited his claim by failing to object below.

Government Code section 70373, subdivision (a)(1) provides: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463 of the Penal Code, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony and in the amount of thirty-five dollars ($35) for each infraction."

In this case, the fine could not have been imposed on defendant because he was not convicted of a violation of the Vehicle Code. Imposition of the facilities fine here was unauthorized. (*People v. Breazell* (2002) 104 Cal.App.4th 298, 305.) Therefore the fine is ordered stricken.

Health and Safety Code § 11351.5

It is defendant's contention that since under Health and Safety Code section 11351, the low term for possessing for sale powdered cocaine is two years, but that under section 11351.5, the low term for possessing for sale rock cocaine is three years, he has been deprived of the guarantees of equal protection under both the federal and state constitutions. Not only did defendant forfeit such a claim by not raising it at the trial level (*People v. Scott* (1994) 9 Cal.4th 331), an identical argument was rejected in *People v. Ward* (2008) 167 Cal.App.4th 252, because rock cocaine has a quicker and more intense effect on the brain than powdered cocaine. We also reject this argument.

III

DISPOSITION

The judgment is affirmed in part and reversed in part.

MOORE, J.

WE CONCUR:

SILLS, P. J.

IKOLA, J.